Supreme Court, U.S.
FILED

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No. 02-

IN THE

Supreme Court of the United States

STEPHEN M. WILSON,

Petitioner,

v.

THIRD GENERATION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Supreme Court of Alabama err in reversing the trial court's Order granting the defendant a new trial when the jury verdict awarded no compensatory damages nor nominal damages but awarded substantial punitive damages, thereby violating the petitioner's Due Process rights?

LIST OF PARTIES

Stephen M. Wilson and Third Generation, Inc. are the only remaining parties to this litigation. Plaintiffs Sammons, Poole and Sammons received consent judgments from Third Generation, Inc. prior to trial which were assigned to Wilson. The individual claims of Benjamin F. Harbin, III, were dismissed. Third-party defendants, Twickenham Trading Company, Inc., Malcolm Briddon and London Trading Co., Inc. never appeared.

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OPINIONS BELOW

The February 7, 2003, opinion of the Supreme Court of Alabama, whose judgment is herein sought to be reviewed (Ex parte Third Generation, Inc., 2003 WL 257469 Ala. Feb. 07, 2003), is reprinted in the separate appendix to this petition, pp. 1a-8a. The prior opinion of the Circuit Court of Madison County, Alabama CV91-118 dated May 13, 2002, is reprinted in the separate Appendix to this petition, pp. 9a-33a.

STATEMENT OF JURISDICTION

The Judgment of the Supreme Court of Alabama was entered on February 7, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States which provides as follows: All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The underlying case began when Stephen M. Wilson (Mr. Wilson) and others decided to invest in Third Generation, Inc., (TGI) a small company engaged in the toy business. Third Generation, Inc. was headed by Benjamin Harbin, a former high school classmate of Mr. Wilson. Ultimately, the business failed and Mr. Wilson, and some of his friends and business associates, lost a great deal of money that they invested in Third Generation, Inc. Litigation followed, when it was determined large sums of money were missing and misappropriated, commencing with a complaint filed by Daniel B. Poole, F. Calame Sammons, M.D., Robert A. Sammons, M.D. and Wilson for monies owed. In the litigation that ensued following the failure of the business, Third Generation, Inc. and Benjamin F. Harbin, III filed claims of fraud, breach of fiduciary duty and other claims against Mr. Wilson.

This case proceeded to trial in 1993. A jury rendered a verdict in favor of TGI and against Wilson in the amount of $0 compensatory, and $125,000 in punitive damages. The jury also rendered a verdict in favor of Wilson and against TGI and Harbin for $15,500 and for inventory previously valued at $75,000. The said verdicts were rendered in the counterclaim for fraudulent suppression and the original claim on a promissory note, respectively.

Wilson moved for a new trial shortly after the original judgment, claiming, among other things, that the jury's verdict on the fraudulent suppression claim was inconsistent. Wilson contended that the said jury verdict specifically found no compensable monetary injury on the fraudulent suppression claim, yet harshly punished Wilson, via punitive damages, on that claim.

On April 29, 1994, after Wilson's initial post-trial motion for a new trial, the trial judge granted a new trial and set aside the judgment dated June 14, 1993. However, in doing so, the trial judge neglected to specify in her order for a new trial the ground, or grounds that she based her decision upon. She merely granted a new trial. TGI appealed the order for a new trial. Consistency of the jury's verdict was argued in each party's Brief to the Supreme Court of Alabama.

On September 8, 1995, the Supreme Court of Alabama reversed the trial judge's Order granting a new trial. The trial judge's said order was flawed because it failed to designate one or more grounds. The judgment of June 15, 1993 was reinstated.

Third Generation, Inc. then began to vigorously execute on its judgment. It filed several garnishments and initiated several levies on Mr. Wilson's personal property. Third Generation, Inc. filed a notice of levy and execution on Mr. Wilson's aluminum fishing boat. On July 29, 1996 the Sheriff of Madison County appeared at Mr. Wilson's home to execute on and attach his aluminum fishing boat. A hearing was held on the various motions pending in the collection phase of the litigation on August 2, 1996. At that time, Mr. Wilson made known his intention to exercise his right, under Code of Alabama § 6-9-91 (1975), to substitute property for personal property that had been levied upon. Mr. Wilson made known to the trial court and the counsel for Third Generation, Inc. his intention to substitute the "inventory" and "Fluppets" of Third Generation, Inc.

At the August 2, 1996 hearing, it was "obvious" to the court, and to Mr. Wilson, that Third Generation, Inc. was not willing to accept the return of its "inventory" and

"Fluppets" in satisfaction of the judgment. Although no transcript of the hearing was made, it was clear that Third Generation, Inc. no longer considered the "inventory" and the "Fluppets" to have the value to which it had testified at trial. In fact, Third Generation, Inc. now took the position that the "inventory" and "Fluppets" were nearly worthless, in stark contrast to its position at trial and on appeal.

Also, on August 2, 1996, but after the hearing described in the preceding paragraph, Mr. Wilson filed a motion for relief from the judgment. This motion was based upon the fact, only learned earlier that same day at the hearing, that Third Generation, Inc. had committed a fraud upon the court, and the judgment in favor of Third Generation, Inc. was based upon perjured testimony.

On August 7, 1996, the trial court entered its order on the pending motions. The trial court held on August 7, 1996:

> In its response, and at the *ore tenus* hearing in this Court, it was obvious that Third Generation, Inc. was adamantly opposed to the receipt of the "inventory," in partial satisfaction of the judgment against Stephen M. Wilson. It appeared to the Court that Third Generation, Inc., did not now believe that the inventory has an actual value which is anywhere near $63,000.
>
> . . . In the instant case, the judgment creditor, Third Generation, Inc., should be, and hereby is, estopped from asserting in the collection phase of this litigation a position that is contrary to the position which it adopted at the trial and appeal phases of the litigation. Accordingly all parties to

> the litigation, including the judgment debtor, are entitled to assume, until shown otherwise, that the "inventory" is valued at approximately $63,000.00, and that the "Fluppets" are valued at approximately $10.00 a piece.
>
> . . . Therefore, it is ORDERED by this court that the execution, levy and sale initiated by Third Generation, Inc. shall proceed and continue. However, Stephen M. Wilson shall be permitted to exercise his rights of substitution as contained in Code of Alabama § 6-9-91 (1975).

Also in the August 7, 1996 Order, the trial judge appointed a special master, pursuant to Rule 53 of the Alabama Rules of Civil Procedure, to oversee the sale of the "inventory" and "Fluppets" and to report back to the court on various issues pertaining to the value of the "inventory" and "Fluppets."

Finally, the August 7, 1996 Order, also allowed Mr. Wilson to offset four judgments which Mr. Wilson had paid. All four of the judgments pertained to the subject matter of the present litigation. Three of the four judgment were obtained in this very same civil action.

The very next day, August 8, 1996, Third Generation, Inc. attempted to frustrate the trial court's August 7th Order by withdrawing its levies on Mr. Wilson's personal property.

Since Third Generation, Inc. had withdrawn its levies on Mr. Wilson's personal property, the day of sale never came, and the special master did not issue a report. In an effort to bring the issue back before the court, Mr. Wilson filed a

motion on January 7, 1997. The affidavit of Dr. Chris Wesley Paul, chairman of the Department of MIS, Economic and Finance of the University of Alabama in Huntsville was filed. Dr. Paul's affidavit stated that the "inventory" was, essentially, worthless and that its sale might subject the seller to criminal sanctions.

Third Generation, Inc. then waited over two and a half years, until May 10, 1999, to take any further action. At that time, it filed a motion for "Complete and Final Relief."

The original trial judge was diagnosed with a brain tumor shortly after the trial of this case and died in 1999. The trial court, now presided over by Judge Laura Jo Hamilton, issued its order on November 8, 2000. The court's order was, essentially, a continuation of the much earlier August 7, 1996 Order, except that no special master was appointed. Judge Hamilton found:

> In the present case, the court agrees that the judgment obtained by Third Generation, Inc. against Mr. Wilson is tainted by proffering of perjured testimony from Third Generation, Inc.'s President, Mr. Benjamin Harbin. This Court find, by clear and convincing evidence, that Third Generation, Inc. engaged in fraud and other misconduct and that this conduct prevented Mr. Wilson from fully and fairly presenting his case. Third Generation, Inc.'s reliance on this perjured testimony during the trial and appeal phases of the litigation, and then its attempted abandonment of its own testimony during the collection phase of the litigation constitutes, in the opinion of the Trial Judge, a fraud upon the

> courts of this state. The Court disagrees with the characterization of the discrepancies by Third Generation, Inc. as a "disputed fact"; it is obvious to this Court that certain inventory valued at $63,000 in sworn testimony is now considered worthless by Third Generation, Inc. and was so at all pertinent times. It is clear to this Court that Mr. Wilson has presented sufficient evidence of intractable conflicts between Mr. Harbin's testimony at the case at bar and the conduct of counsel for Third Generation, Inc. during the collection phase that Mr. Harbin committed perjury was exacerbated by arguments during trial and on appeal, Mr. Wilson was severely prejudiced by these discrepancies. This Court further finds that the evidence supports Mr. Wilson's argument that a material witness, Benjamin Harbin, testified falsely on an ultimate issue in the case.

In her November 8, 2000 Order, Judgment Hamilton ordered Third Generation, Inc. to either accept the inventory at the value sworn to by it during the trial in partial satisfaction of the judgment, or a new trial would be ordered. Third Generation, Inc. responded to Judge Hamilton's Order on December 8, 2000, by filing a Petition for Writ of Mandamus.

On July 13, 2001, the Supreme Court of Alabama granted the petition and issued the Writ. The trial judge drafted and entered a Judgment Entry dated March 8, 2002, which effectively set aside and vacated the November 8, 2000 Order.

On or about April 3, 2002, Third Generation, Inc. filed a "Motion to Vacate or Set Aside Judgment of March 8, 2002."

On April 8, 2002, Wilson filed a Motion for a New Trial or in the alternative, Motion to Alter, Amend or Vacate or in the alternative, Motion for Remittitur on the grounds that the jury's verdict on the fraudulent suppression claim was inconsistent, was grossly excessive, and violates the due process provisions of the United States Constitution and the State of Alabama Constitution. On May 13, 2002, the trial court entered its order granting Wilson a new trial.

Third Generation, Inc. filed a "Motion to Enforce Writ of Mandamus or in the alternative, Second Petition for Writ of Mandamus or Other Extraordinary Writ of Relief" on June 11, 2002.

On February 7, 2003, the Supreme Court of Alabama granted the Writ of Mandamus and ordered the trial court to:

1. Vacate its order May 13, 2002; and,

2. Reinstate the June 15, 1993, original judgment on the jury's verdict with, as the trial court ordered on March 11, 1996, post judgment interest to be awarded at the statutory rate from June 15, 1993 to the time the judgment is paid.

Stage in the proceedings in which Federal question sought to be reviewed was raised

Wilson moved for a new trial shortly (July 12, 1993) after the original judgment, claiming, among other things that the jury's verdict on the fraudulent suppression claim was inconsistent. This was done by a Motion for Judgment Not Withstanding the Verdict, for New Trial, and, alternatively, for Remittur. The trial judge granted the Motion for New Trial, but this decision was reversed by the Supreme Court of Alabama which ordered the trial court to reinstate the judgment on the jury's verdict in its opinion of May 5, 1995.

By Order of November 8, 2000, the trial judge ordered Third Generation, Inc. to either accept the inventory at the value sworn to by it during the trial in partial satisfaction of the judgment, or a new trial would be ordered. Third Generation, Inc. responded by filing a Writ of Mandamus.

On July 13, 2001, the Supreme Court of Alabama granted the petition and issued the Writ.

On April 8, 2002, Wilson filed a Motion for a New Trial or in the alternative, Motion to Alter, Amend or Vacate or in the alternative, Motion for Remittur on the Grounds that the Jury's Verdict on the fraudulent suppression claim was inconsistent, was grossly excessive, violate the due process provisions of the United States Constitution and the State of Alabama Constitution.

On May 13, 2002, the trial court entered its order granting Wilson a new trial on the basis of Due Process violations.

On February 7, 2003, the Supreme Court granted the Writ of Mandamus and ordered the trial court to reinstate the original judgment on the jury's verdict.

REASONS FOR GRANTING THE WRIT

In violation of the petitioner's procedural and substantive due process rights, the Alabama Supreme Court overturned the decision of the Madison County, Alabama Circuit Court to grant Mr. Wilson a new trial, and ordered the trial court to reinstate a judgment which violates Mr. Wilson's procedural and substantive due process rights. The issue of constitutional deficiencies in jury verdicts is one that has troubled the Supreme Court of Alabama for quite some time. In 1996, the United States Supreme Court granted certiorari review of *Life Insurance Company of Georgia v. Johnson*, 519 U.S. 923, 117 S. Ct. 288,

along with several other Alabama cases awarding punitive damages. In its *BMW* opinion, the United States Supreme Court addressed the constitutional challenge to such verdicts and announced a decision requiring states to judicially review jury verdicts that award punitive damages, to determine whether such verdicts violate the tortfeasor's rights under the Due Process Clause of the United States Constitution. The Supreme Court emphasized that this postverdict judicial review must be meaningful, with special emphasis being given to three "guideposts": (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive damages to the amount of actual or potential harm suffered by the plaintiff; and (3) a comparison of the amount of the jury's verdict with civil or criminal penalties (if any) that could be imposed under the law for comparable misconduct. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589.

On April 7, 2003, the United States Supreme Court handed down its most detailed ruling yet on the issue of Due Process deficiencies in punitive damage awards in the case of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003). The Supreme Court noted that while states possess discretion over the award of punitive damages, there are procedural and **substantive** (emphasis added) constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. These limitations are especially important because punitive damage awards serve the same purpose as criminal penalties, but without the same protections afforded in a criminal proceeding. The wide discretion left to the jury in awarding damages coupled with presentation of the defendant's net worth, creates the potential that juries will use their verdicts to express bias against big businesses, particularly those without a strong

local presence. In light of these concerns, the Court turned to the three guideposts it established in *Gore*, and examined each in turn as applied to the context of this case.

The first and most important indicator of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's misconduct. Under *Gore*, it should be presumed that a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. Factors to consider in reaching this determination include whether the harm was physical as opposed to economic; whether the conduct evidenced a reckless disregard for the health and safety of others; whether the target of the conduct had financial vulnerability; whether the conduct involved repeated actions or an isolated incident; and whether the harm was the result of intentional malice, trickery, or deceit, or merely an accident. The Court first acknowledged that State Farm's handling of the case merited no praise. State Farm had altered records, proceeded to trial in the face of near certainty that a verdict in excess of the policy limits would be rendered, and wrongly assured the Campbells that their assets would be safe. While State Farm's conduct toward Campbell warranted punitive damages, a more modest award would have satisfied the state's legitimate objectives, and the Utah courts should have gone no further. Instead this case became a platform to expose and punish the perceived deficiencies of State Farm's operations throughout the country. From the opening statements forward, the Campbells framed the case as a chance to rebuke State Farm for its nationwide activities.

("This is a very important case . . . [I]t transcends the Campbell file. It involves a nationwide practice. And you, here, are going to be evaluating and assessing, and hopefully requiring State Farm to stand accountable for what it's doing across the country, which is the purpose of punitive damages.") Some of the acts were legal in the states where they were conducted and therefore, outside the scope of the state's realm of punishment. The Court concluded that the Campbells presented scant evidence of repeated conduct of the sort that injured them. The trial court awarded damages to punish and deter conduct that bore no relation to Campbell's harm. "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."

Turning to the second guidepost, the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, the Court noted that it has consistently declined to impose a bright-line ratio which a punitive damages award cannot exceed and that it was declining to do so here. "Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." While the ratio may exceed these limits, "when the compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." In the case at bar, the compensatory award was substantial, the harm caused was economic rather than physical, and therefore there is a presumption against an award that has a 145 to 1 ratio. The Court further noted that many

compensatory awards, such as those for emotional distress, contain a punitive element themselves which is to be considered. Finally, as to guidepost two, the Court held that the wealth of the defendant cannot justify an otherwise unconstitutional punitive damages award.

The third guidepost in *Gore* is the disparity between the punitive damages award and the civil penalties authorized or imposed in comparable cases. The Court did not dwell on this guidepost. The most relevant civil sanction in Utah was a $10,000 fine for an act of fraud, which was obviously dwarfed by the $145 million award. The Utah court's references were to the broad fraudulent scheme of State Farm drawn from evidence of out-of-state conduct and dissimilar conduct, and was therefore insufficient to justify the award.

Under the above principles, the Court concluded that this case "is neither close nor difficult." The $145 million punitive damage award was not reasonable nor proportionate to the wrong committed and constituted an irrational and arbitrary deprivation of the property of the defendant. "An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages." The judgment of the Utah Supreme Court was reversed and the case remanded.

The Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. *E.g.*, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433, 121 S. Ct. 1678, 149 L. Ed. 2d 674. When the instant case was decided by the jury, the Alabama case law was not clear. As cited in the trial judge's order of

May 13, 2002, "it is settled that punitive damages cannot be awarded unless the jury awards nominal or compensatory damages". *O.K. Bonding Company v. Milton*, 579 So. 2d 602 (Ala. 1991). Yet, in the same year, in the case of *First Bank of Boaz v. Fielder*, 590 So. 2d 893 (Ala. 1991), the jury awarded zero compensatory damages on a suppression count yet awarded the plaintiff punitive damages. The Supreme Court of Alabama in this case stated that it had never required an award of nominal damages as a prerequisite to an award of punitive damages, and it refused to require such an award. However, the Supreme Court of Alabama later candidly acknowledged that when it wrote its opinion in *First Bank of Boaz* it was unaware of the previously published opinion in the *O.K. Bonding* case. *See Shoals Ford, Inc. v. McKinney*, 605 So. 2d 1197, 1199 (Ala. 1992). The petitioner has argued this inconsistency throughout the pending case on various appeals, yet the Supreme Court of Alabama continues to apply erroneous legal principals. Your petitioner believes, however, that irrespective of the Supreme Court of Alabama's conclusion on this subject, the order of the Circuit Court is correct, and to allow the Supreme Court of Alabama opinion to stand violates the petitioner's Due Process protection.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF ALABAMA DATED FEBRUARY 7, 2003

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2002-2003

1000471

Ex parte Third Generation, Inc.

PETITION FOR WRIT OF MANDAMUS

(In re: Stephen M. Wilson

v.

Benjamin F. Harbin III, individually, and
Third Generation, Inc.)

(Madison Circuit Court, CV-91-1118)

HOUSTON, Justice.

This petition for a writ of mandamus represents the third time this case has been before us. The case was tried in 1993, and a judgment was entered on a jury verdict awarding $125,000 to Third Generation, Inc. ("TGI"), on its claims against Stephen M. Wilson, and $15,500 to Wilson on his claims against TGI and Benjamin F. Harbin III. The trial court subsequently granted a new trial, but we reversed that decision and ordered the trial court to reinstate the judgment on the jury's verdict. *Third Generation, Inc. v. Wilson*, 668 So. 2d 518 (Ala. 1995).

Appendix A

We later granted TGI's petition for a writ of mandamus and directed the trial court to set aside its November 8, 2000, order granting Wilson's Rule 60(b)(3), Ala. R. Civ. P., motion[1] and compelling TGI to accept worthless inventory as partial satisfaction of its judgment against Wilson. *Ex parte Third Generation, Inc.*, 820 So. 2d 89 (Ala. 2001). The trial court then issued two orders dated March 8, 2002, and May 13, 2002. The March 8 order limited TGI's postjudgment interest to approximately 19 months. However, the May 13 order, granted in response to Wilson's April 8, 2002, Rule 60(b)(4), Ala. R. Civ. P., motion,[2] set aside the judgment on the grounds that it was "void" and ordered a new trial.

TGI now seeks a writ of mandamus directing the trial court (1) to vacate the March 8 and May 13 orders and (2) to enter an order reinstating the judgment on the jury verdict with postjudgment interest to run from June 15, 1993 — the date of the original entry of judgment on the jury verdict[3] — to the present. However, TGI's request for mandamus relief from the March 8 order is unnecessary because in

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1. While Wilson had purportedly filed his motion pursuant to Rules 60(b)(3) *and* 60(b)(6), we noted that, given the substance of his motion (which was based upon alleged perjury), the motion was properly filed pursuant only to Rule 60(b)(3). See *Ex parte Third Generation, Inc.*, 820 So. 2d 89, 90 (Ala. 2001).

2. Although the motion was not styled as a Rule 60(b)(4) motion, the parties agree that the trial court correctly treated Wilson's motion for a new trial as a Rule 60(b)(4) motion.

3. Our 1995 opinion erroneously gave this date as "June 14, 1993." *Third Generation, Inc. v. Wilson*, 668 So. 2d at 521.

its May 13 order the trial court vacated the March 8 order. Therefore, we need address only the issue whether TGI is entitled to a writ of mandamus with respect to the May 13 order.

I. Analysis

To be successful, TGI must demonstrate "(1) a clear legal right . . . to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court." *Ex parte Integon Corp.*, 672 So. 2d 497, 499 (Ala. 1995). If either the trial court's original judgment on the jury verdict was not "void" or Wilson's Rule 60(b)(4) motion was not filed within "a reasonable time" after the judgment became final as required of motions filed under Rule 60(b)(4), then it is apparent not only that TGI would have a clear legal right to have the May 13 order set aside, but also that the other prerequisites for mandamus relief would be met. Therefore, because we hold that the judgment entered on the jury verdict was not void, TGI is entitled to a writ of mandamus.

As discussed in our 1995 opinion, the jury awarded TGI $0 in compensatory damages and $125,000 in punitive damages on TGI's fraudulent-suppression claim against Wilson. *Third Generation*, 668 So. 2d at 521. If such a verdict were awarded today, the losing party would certainly be entitled to a new trial based on our decision in *Life Insurance Co. of Georgia v. Smith*, 719 So. 2d 797 (Ala.1998). In *Smith*, we stated that in order to be consistent with due process, "a jury's verdict [must] specifically award either compensatory

damages or nominal damages in order for an award of punitive damages to be upheld." 719 So. 2d at 806 (citing *BMW of North America v. Gore*, 517 U.S. 559 (1996)). However, at the time the judgment was entered on the jury's verdict in this case — June 15, 1993 — such an award was acceptable. See *First Bank of Boaz v. Fielder*, 590 So. 2d 893 (Ala. 1991).[4]

In its May 13 order, the trial court granted Wilson's motion under Rule 60(b)(4), Ala. R. Civ. P., on the basis that the jury's verdict was inconsistent under *Smith* and that it thereby violated his due-process rights. The order cites *Satterfield v. Winston Industries, Inc.*, 553 So. 2d 61, 64 (Ala. 1989), in which this Court stated:

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4. TGI argues that the matter of the inconsistent verdict was resolved on appeal in 1995 and is now — regardless of any later-determined due-process problems — "the law of the case." See *Third Generation, Inc. v. Wilson*, 668 So. 2d at 521-22. While not raised by the parties, one of the difficulties with TGI's law-of-the-case argument is Ala. Code 1975, § 12-2-13, which appears to negate any binding effect of the "law-of-the-case" doctrine as it applies to this Court:

> "The Supreme Court, in deciding each case when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what, in its opinion, at that time is law, without any regard to such former ruling on the law by it; but the right of third persons, acquired on the faith of the former ruling, shall not be defeated or interfered with by or on account of any subsequent ruling."

However, our disposition of this petition obviates the need to address this issue.

Appendix A

> "The standard of review on appeal from the denial of relief under Rule 60(b)(4) [Ala. R. Civ. P.] is not whether there has been an abuse of discretion. When the grant or denial of relief turns on the validity of the judgment, as under Rule 60(b)(4), discretion has no place. If the judgment is valid, it must stand; if it is void, it must be set aside. A judgment is void only if the court that rendered it lacked jurisdiction of the subject matter or of the parties, *or if it acted in a manner inconsistent with due process.*"

(Citing *Pollard v. Etowah County Comm'n*, 539 So. 2d 225 (Ala. 1989), and *Cassioppi v. Damico*, 536 So. 2d 938 (Ala. 1988).) (Emphasis added.) Essentially, in its May 13 order the trial court ruled that because the jury verdict violated Wilson's *substantive* due-process rights as described in *Smith*, the judgment entered on that verdict was void and the court, therefore, had an *express duty* to grant the requested relief. The order relied not solely on *Smith*, but also on *BMW of North America v. Gore*, 517 U.S. 559 (1996), which provided the foundation for our decision in *Smith*.[5]

The main issue presented by this mandamus petition is whether the trial court's grant of Wilson's Rule 60(b)(4) motion for a new trial — filed nine years after the original judgment was entered — was proper based on the reasoning

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5. The May 13 order especially relies upon the United States Supreme Court's statement that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (quoted in *BMW* at 517 U.S. at 573 n.19).

in *Smith*.[6] Wilson contends (1) that his motion was filed within a reasonable time after the entry of judgment because, when he filed the motion, the case was still "pending" in that the manner of collecting the judgment was still in dispute, and (2) that the trial court had no discretion in ruling on his motion and had to grant the motion based on the due-process violation.

We agree with Wilson on only one point: a trial court's ruling on a Rule 60(b)(4) motion involves no discretion; whether a judgment is void is purely a matter of law, and a trial court must grant a properly presented Rule 60(b)(4) motion filed in response to a void judgment. However, we do not agree that the judgment was void, a conclusion that pretermits any discussion of whether the motion was filed within a reasonable time.

As stated above, *Satterfield* includes in the definition of a "void" judgment for purposes of Rule 60(b)(4) those judgments in which the trial court has "acted in a manner inconsistent with due process." 553 So. 2d at 64. However, as we recently discussed in *Neal v. Neal*, [Ms. 1991439, Sept. 6, 2002] __ So. 2d __(Ala. 2002), the term "due process," in the context of providing a foundation for declaring a judgment void, refers to *procedural*, rather than *substantive*, due process:

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6. In *Smith*, we specifically stated that the "new" rule requiring an award of some compensatory or nominal damages as a prerequisite for an award of punitive damages would "not be applied so as to require *reversal and the rendering of a judgment* for the defendant in any case tried before [July 17, 1998]." 719 So. 2d at 807 (emphasis added).

> " '[I]t is established by the decisions in this and in Federal jurisdictions that *due process of law* means notice, a hearing according to that notice, and a judgment entered in accordance with such notice and hearing.'
>
> "*Frahn v. Greyling Realization Corp.*, 239 Ala. 580, 583, 195 So. 758, 761 (1940) (emphasis added [in *Neal*]). The rule that a want of due process, so defined, voids a judgment is not redundant with the rule that a want of personal jurisdiction likewise voids a judgment, for a person already effectively made a party to litigation could, on some critical motion or for some critical proceeding within that litigation, be deprived of the 'notice, a hearing according to that notice, and a judgment entered in accordance with such notice and hearing,' required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, *Frahn*, supra. See *Winhoven v. United States*, 201 F.2d 174 (9th Cir.1952), *Bass v. Hoagland*, 172 F.2d 205 (5th Cir.1949), *Cassioppi [v. Damico*, 536 So. 2d 938 (Ala. 1988)], and *Seventh Wonder [v. Southbound Records, Inc.*, 364 So. 2d 1173 (Ala. 1978)].

Neal, __ So. 2d at __.

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Because our decision in *Smith* was based on *substantive* due-process grounds (following the lead of the United States Supreme Court's *BMW* decision), the *Smith* rationale may not be used as a ground for declaring a judgment void under Rule 60(b)(4). Therefore, the original judgment entered on the jury's verdict was not void, and the trial court erred in granting Wilson's Rule 60(b)(4) motion.

II. Conclusion

For the reasons stated above, TGI is entitled to a writ of mandamus. Therefore, we issue the writ and order the trial court (1) to vacate its order of May 13, 2002, and (2) to reinstate the June 15, 1993, original judgment on the jury's verdict with, as the trial court ordered on March 11, 1996, postjudgment interest to be awarded at the statutory rate from June 15, 1993, to the time the judgment is paid. See *Raines v. Williams*, 397 So. 2d 86 (Ala. 1981); *Berry v. Druid City Hosp.*, 333 So. 2d 796 (Ala. 1976).

PETITION GRANTED; WRIT ISSUED.

Moore, C.J., and See, Lyons, Brown, Johnstone, Harwood, Woodall, and Stuart, JJ., concur.

APPENDIX B — ORDER OF THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA DATED MAY 13, 2002

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

CIVIL ACTION NO. CV91-1118JWB

ROBERT A. SAMMONS, F. CALAME SAMMONS, DANIEL B. POOLE and STEPHEN M. WILSON,

Plaintiffs,

V.

BENJAMIN F. HARBIN, III, individually, and THIRD GENERATION, INC., a corporation,

Defendants/Third-Party Plaintiffs,

V.

TWICKENHAM TRADING COMPANY, INC., MALCOLM BRIDDON and LONDON TRADING CO., INC.,

Third-Party Defendants.

ORDER

This ORDER is rendered after both parties filed post-judgment motions to a Judgment Entry of this Court that was entered on March 8, 2002. On April 8, 2002, the plaintiff/ Counterclaim defendant Stephen M. Wilson filed a "Motion

for a New Trial or in the alternative Motion to Alter, Amend, or Vacate Judgment or in the Alternative Motion for Remittitur" (hereafter Plaintiff's 2002 Motion for a New Trial). On or about April 3, 2002, the defendant/Counterclaim plaintiff filed a "Motion to Vacate or Set Aside Judgment Entry of March 8, 2002." This order is dispositive of both pending motions.

Wilson had moved for a new trial shortly after the original judgment, claiming, among other things that the jury's verdict on the fraudulent suppression claim was inconsistent. That is, the jury returned a verdict on the fraudulent suppression claim in favor of TGI and against Wilson for $0 nominal, $0 compensatory damages and $125,000 in punitive damages. The said jury verdict revolved around a manifest inconsistency. It specifically found no compensable monetary injury on the fraudulent suppression claim, yet harshly punished Wilson, via punitive damages. While it is not necessary to discover the jury's motive, it is necessary to remedy wrongs that occur on the route to justice. Some history and references to the record will be useful.

The late Judge Jeri Blankenship presided over the trial of this case. Based upon the record, it appears that Judge Blankenship recognized the injustice of the jury's inconsistent verdict. After Wilson's initial motion for a new trial, Judge Blankenship granted a new trial. However, Judge Blankenship did not specify which ground she based her decision upon. She merely granted a new trial. TGI filed an appeal. Consistency of the jury's verdict was argued in each party's Brief to the Supreme Court of Alabama. In fact, in its opinion, when the Supreme Court of Alabama stated the issue, it wrote the following:

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> "TGI argues that the trial court erred in granting Wilson's motion for a new trial, because, it contends, **the absence of compensatory damages was not inconsistent with the jury's award of punitive damages for fraud.**" *Third Generation, Inc. v. Stephen M Wilson*, 668 So. 2d 518, 521 (Ala. 1995).

In reversing Judge Blankenship's order granting a new trial, the Alabama Supreme Court unequivocally relied upon *First Batik of Boaz v. Fielder*, 590 So. 2d 893 (Ala. 1991) and stated that *"Fielder* specifically held that an award of compensatory or nominal damages is not a prerequisite to an award of punitive damages." at 521.

Throughout the pendency of this case, which continues, TGI has made statements indicating that Wilson and perhaps others have suspicious agendas regarding their motives and actions. For example, on June 5, 1995, TGI stated the following to the Supreme Court of Alabama:

> "Wilson obviously is intent on finding some way to get this case back before the same trial court whose view of the case already has resulted in an unfounded decision to grant a new trial." (Brief of Appellant to the Supreme Court of Alabama in Opposition to Application for Rehearing, p. 12).

> Later, on December 8, 2000, TGI stated the following to the Supreme Court of Alabama:

> Confronted with the foregoing history, including a persistent pursuit by the trial court of a different view of the facts and evidence than that which was adopted by the jury and this Court, a pattern of trial court delays, erroneous rulings against TGI, the failures of the trial court to address TGI's contentions, the promptness of the trial court's response to Wilson's motions, and the scheme set forth in the unsigned order to vacate the judgment if it turned out that the inventory was no longer of adequate value, TGI saw no choice but to file a withdrawal of the levies it had previously sought. (TGI's Petition for Writ of Mandamus, page 15).

The implication to reviewing Courts was that Judge Blankenship's order granting a new trial was at best unsupported. The negative implications are as serious as can be made. While the original order granting a new trial may be criticized for not designating one or more grounds, this court takes this opportunity to note for the record that the *Life Insurance Company of Georgia v. Smith*, 719 So. 2d 797, 805-806 (Ala. 1998) and the *BMW of North America v. Gore*, 517 U.S. 559, 573 (1996) cases have verified that Judge Blankenship's order for a new trial was not only defensible but also the correct decision and consistent with prior and subsequent decision by the state's and the nation's highest Court.

Certain reflection, while not dispositive, may be helpful because a mammoth award of punitive damages without any award at all of compensatory damages is problematic in and of itself. Juries are bound by the law, and allowing juries to

administer punishment in the form of punitive damages in civil cases without any actual injury to a defendant confers unbridled discretion in juries and invites abuses and losses of credibility for the fair administration of justice. If Wilson did perpetuate fraud, there should have been a verdict for at least a minuscule amount of compensatory damages, as reliance **to a plaintiff's detriment** is an element of that cause of action. The absence of an award of compensatory or nominal damages clearly resolves the question of whether any reliance upon Wilson's alleged fraudulent actions was to TGI's detriment. If there had been reliance to TGI's detriment, there would have been an award of compensatory damages. Hence, Wilson was punished by a six-figure punitive damage award for something that the jury concluded caused no compensable injury to TGI.

This brings one to the fundamental premise announced by the U.S. Supreme Court that, "To punish a person because he has done what the law allows him to do is a due process violation of the most basic sort." *BMW of North America v. Gore*, 517 U.S. 559, 573 (1996).

Until approximately four years ago, the law in Alabama regarding whether an award of at least nominal or compensatory damages is required before an award of punitive damages is allowable was disputable. On December 8, 2000, TGI stated to the Alabama Supreme Court in its Petition for Writ of Mandamus the following:

> At the time this case was decided, Alabama law permitted an award of punitive damages even though no compensatory damages were awarded,

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> *See First Bank of Boaz v. Fielder*, 590 So. 2d 893 (Ala. 1991). This rule was changed in 1998. *See Life Insurance Company of Georgia v. Smith*, 719 So. 2d 797, 805-806 (Ala. 1998) (overruling *First Bank of Boaz* and stating, "We now require, therefore, that a jury's verdict specifically award either compensatory damages or nominal damages in order for an award of punitive damages to be upheld."). [footnote 3, page 6].

To provide the entire context for the above TGI quote, it is necessary to supplement it. When the instant case was decided by the jury, the Alabama case law was not this clear. In Life *Insurance Company of Georgia v. Smith*, 719 So. 2d 797, 805-806 (Ala. 1998), the Alabama Supreme Court clarified the law that Wilson called upon in his initial motion for a new trial. The words of the Court in *Smith* demonstrate that when the jury rendered its verdict in the case at bar, case law existed that was contrary to *First Bank of Boaz v. Fielder.* While the following quote is lengthy, the Court's words are enlightening and on point. The Court, on the way to overruling *First Bank of Boaz v. Fielder*, *supra.*, provided context and clarification of Alabama law on this issue.

> The next case in the sequence is O.K. *Bonding Co. v. Milton*, 579 So. 2d 602 (Ala. 1991), where a judgment was entered on a verdict of $0 in nominal or compensatory damages and $15,000 in punitive damages. This Court reversed the judgment, citing *Mid-State Homes, Inc. v. Johnson*, 294 Ala. 59, 311 So. 2d 312 (1975), and stating **"It is settled that punitive damages**

cannot be awarded unless the jury also awards nominal or compensatory damages." 579 So. 2d 604. In *Mid-State Homes*, this Court had affirmed a judgment based on a general verdict (awarding an amount that was implicitly divisible into a $715 restitutionary award and an $11,785 punitive award) and recognized the rule that an award of at least nominal damages was necessary to support an award of punitive damages.

Then in *First Bank of Boaz v. Fielder*, 590 So. 2d 893 (Ala. 1991), the jury awarded $0 compensatory damages on the suppression count, yet awarded the plaintiff punitive damages. This Court upheld the punitive damages award, citing the rule that a non-compensable violation of a legally protected right that would support only an award of nominal damages, in recognition of the tort, was sufficient to satisfy the injury element of a fraud claim. This Court stated that it had **never** required an award of nominal damages as a prerequisite to an award of punitive damages, and it refused to require such an award. The Court specifically held that an award of compensatory damages or nominal damages was not a prerequisite to an award of punitive damages. However, **this Court later candidly acknowledged** that when it wrote its opinion in ***First Bank of Boaz*** **it was unaware of the previously published opinion** in O.K. *Bonding.* See *Shoals Ford, Inc. v. McKinney*, 605 So. 2d 1197, 1199 (Ala. 1992).

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In *Caterpillar, Inc. v. Hightower*, 605 So. 2d 1193 (Ala. 1992), the stage was set for a collision between *O.K. Bonding and First Bank of Boaz. In Caterpillar*, the jury verdict form stated that the entire award of $250,000 was punitive. This Court upheld the judgment entered on the jury's award, citing *First Bank of Boaz* for the **rule that an award of compensatory damages was not necessary for a jury to award punitive damages.** However, the majority's effort in *Caterpillar* to distinguish *O.K. Bonding* was strongly challenged in a dissenting opinion.

Next in this line of cases is *Shoals Ford. Inc. v. McKinney*, 605 So. 2d 1197, 1199 (Ala. 1992), where a plurality of the Court affirmed an award of only punitive damages on the ground that the record supported a finding of injury, "at least nominally." 605 So. 2d 1197, 1199 (Ala. 1992). One Justice's concurrence found *O.K. Bonding and First Bank of Boaz* irreconcilable and suggested that *O.K. Bonding* be overruled. Two dissenting opinions also found the two cases irreconcilable, but maintained that *O.K. Bonding* stated the better rule of law. Each of the two dissenting opinions mentioned that section 6-11-1 required specificity in verdicts, 605 So. 2d at 1202, 1204 (Ala. 1992).

After *Shoals Ford*, the Court decided *Garrett v. City of Auburn*, 623 So. 2d 1033 (Ala. 1993). In *Garrett*, it followed the rule of law established

by *First Bank of Boaz* and *Caterpillar*, without citing O.K. *Bonding*. Because it is not unreasonable for these present plaintiffs to argue that *O.K. Bonding* has been impliedly overruled, we believe a clarification in the law of damages is essential. We now recognize that Justice Almon's dissent in *Shoals Ford* accurately stated the issue when he accurately pointed out that only since we have seen verdicts expressed more specifically than as a generic lump sum have we had problems. In earlier cases upholding punitive damages awards where there was a lump sum verdict, the Court had quite correctly parsed the record to see if a portion of the generic dollar verdict was fairly referable to nominal damages. However, we believe the practice of combing the record on appeal for evidence of an injury to the plaintiff can no longer be applied to verdicts that separate compensatory and punitive damages or simply label an award solely as punitive damages.

In this era following *BMW of North America, Inc. v. Gore*, supra, we recognize that **closer scrutiny of the relationship between compensatory damages and punitive damages is necessary,** and we recognize that causes of action have accrued since the effective date of section 6-11-1, which contains a requirement of specificity in verdicts, a requirement that may still apply to some extent even after *Clark v. Container Corp. of America, Inc.*, 589 So. 2d 184 (Ala. 1991). Moreover, we recognize the **mandate for due**

> **process** and for the administration of justice "without sale, denial, or delay," as secured to litigants by Art. 1, section 13 Alabama Constitution of 1901. **We now require therefore, that a jury's verdict specifically award either compensatory damages or nominal damages in order for an award of punitive damages to be upheld. Thus, we overrule *First Bank of Boaz*, *Caterpillar*, *Shoals Ford*, and *Garrett*, to the extent those opinions conflict with this rule of law.** *Life Insurance Company of Georgia v. Smith*, 719 So. 2d 797, 805-806 (Ala. 1998). [Emphasis added]

Judge Blankenship recognized and this court continues to recognize that scrutiny of the relationship between compensatory damages and punitive damages is necessary for Constitutional and pragmatic reasons. This Court has an obligation to look to the U. S. Constitution first and then to the Alabama Constitution for guidance in crafting this order. While this has not been and is not the path of least resistance in this case, it has proven to be the correct path.

INCONSISTENT VERDICT IN THE CONSTITUTIONAL CONTEXT

This court has a profound interest in administering the rule of law in this case in a manner that is consistent, just, and honorable. In order to do so, the court has thoroughly dissected the record herein and applied the prevailing rules of law.

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It is beyond question that the jury's verdict was problematic at best or illegal and unconstitutional at worst. The United States Constitution, being the preeminent law of the land, was consulted and relied upon where appropriate. Fortunately,, the Supreme Court of the United States addressed punitive damages in a constitutional context in *BMW of North America v. Gore*, 517 U. S. 559; 116 S.Ct. 1589; 134 L.Ed. 2d 809 (1996). Before considering the applicability of all or portions of the *Gore* decision, it is prudent to make note of additional guidance provided by the Supreme Court of the United States regarding issues in this case.

In the present case, the argument regarding whether the jury's verdict was inconsistent, made at the earliest opportunity by Wilson, clearly included the idea that the jury's award of $125,000 to TGI was grossly excessive. Certain foundational principles are implicated and should be mentioned.

It is elementary that those who are subject to the laws of the United States are entitled to notice of the types of conduct that might result in liability. Furthermore, they are entitled to some sense of certainty regarding punishments and penalties. Again, punitive, damages function to punish defendants (and discourage similar conduct by others).

> "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore* at 574.

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In the case at bar, the jury's verdict of no compensatory or nominal damages can only be interpreted as a determination by the jury that Wilson's conduct did not cause any injury or damage to TGI. To punish Wilson to the extent of $125,000 for causing absolutely no unlawful injury or damage to TGI appears to defeat such "Elementary notions of fairness."[1] To take this reasoning one short step further, if the exact evidence that was adduced at trial had shown that Wilson's conduct resulted in $1,000,000 in profits for TGI, the jury could have rendered the very same verdict. An award of $125,000 in punitive damages against Wilson for no damage or injury is as unjust and inconsistent as the same punitive award for a TGI profit due to Wilson's alleged fraudulent suppression. Either scenario is ludicrous and has potential to reduce a noble system of litigation to absurdity. Fraud is a serious intentional tort that attempts to provide an avenue for making defrauded parties whole again. Since fraud

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1. Other problems are presented by allowing juries to award punitive damages without awarding compensatory or nominal damages. For instance, if during trial, counsel for a defendant charged with fraud recognizes that inadequate proof of damages has been offered by the plaintiff, defendant's counsel will elect to offer no proof of lack of culpability and other mitigating factors that are relevant to the amount of punitive damages. Such an election by the defendant's counsel would be excellent trial strategy, as one should not impose impossible options by the jury. Doing so might actually cause the jury to conclude that the possibility of awarding punitive damages without finding compensatory damages is a viable option. This is one of the trial strategy decisions that is available by knowing the possibilities and severity of punishment that is available. Without such knowledge, superfluous counts and claims would have to be addressed by defendants. This is inconsistent with guarantees of fundamental fairness and judicial economy.

is an intentional tort, punitive damages are available to punish defendants and discourage future similar wrongdoing. However, one must not forget that there must be wrongdoing and its corresponding injuries. Without proof of damage or injury to the defendant, an allegation of fraud might well become a lawful windfall. Proof of misrepresentations, strong verbal exchanges, and agitation might cause interpersonal problems and disgust; however, the elements of the fraudulent suppression cause of action are not present. Under such flawed reasoning, it is conceivable that a jury might be tempted to punish one for childish, yet lawful behavior by rendering an award of punitive damages. The law doesn't allow total jury impunity and unbounded discretion. Again, it must be stated that: "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U. S. 357, 363 (1978); *BMW of North America v. Gore*, *supra.*

In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 113 L.Ed.2d 1, 111 S.Ct. 1032 (1991) the U.S. Supreme Court examined the constitutional significance of legal standards that furnish reasonable constraints within which discretion is exercised when awarding punitive damages. The Court noted that "Unlimited jury discretion — or unlimited judicial discretion for that matter — in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." at 18. Additionally, legal standards are needed and "must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior. The standards the Alabama court applied here [in *Gore*] are vague and open ended to the point where

they risk arbitrary results." *BMW of North America, Inc. v. Gore* at 588. (Breyer joined by O'Connor and Souter concurring).

INSTRUCTION FROM THE GORE CASE

It is instructive to examine the *BMW of North America v. Gore, supra.*, case, as it addressed Alabama's law on punitive damages. Much of the *Gore* opinion is directly applicable to the instant case. In *Gore*, a jury awarded the plaintiff, Dr. Gore, $4 million in punitive damages and $4,000 in compensatory damages. The Alabama Supreme Court, after applying the factors in *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-224 (Ala, 1989), remitted the punitive award to $2 million. The Supreme Court of the United States granted certiorari and reversed and remanded. The $2 million punitive damage award was held to be grossly excessive and exceeded the limits of the Due Process clause of the Fourteenth Amendment to the U.S. Constitution. Hence, the application of the *Green Oil* standard alone was not enough to pass Constitutional muster. Justice Stevens, writing for the *Gore* majority concisely stated that, "The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive punishment on a tortfeasor'. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993)." *BMW of North America v. Gore*, 517 U.S. 559, 562 (1996).

There is no doubt that the State of Alabama had and continues to have the ability to allow punitive damages in various types of torts. Writing for the majority in *Gore*, Justice Stevens stated as follows:

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> Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition *Gertz v. Welch*, 418 U.S. 323, 350 (1974); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981). . . . Only when an award can fairly be characterized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due process clause of the Fourteenth Amendment. Cf. *TXO*, 509 U.S. 456. For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve. We therefore focus our attention first on the scope of Alabama's legitimate interests in punishing BMW and deterring it from future misconduct, at 568.

It is quite evident that a $125,000 verdict for punitive damages is tantamount to a severe criminal penalty. While Alabama does have a legitimate interest in protecting its citizens from fraudulent suppression, this interest would be stronger as more money is stolen, etc. from innocent victims. It is noteworthy that TGI and Harbin were also defendants who suffered an adverse judgment in the same case in which they received a $125,000 punitive damage award. Essentially, the punishment does not fit the crime, assuming *arguendo* that a crime had been committed.

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CIRCUMSTANCES THAT CAUSED THIS CASE TO REMAIN PENDING

The case of *Wilson v. TGI* has been pending through the present time. Granted, this length of time for a case to remain pending is unusual; however, there are legitimate reasons for this fact. First, as has been mentioned, the original trial judge, the Honorable Jeri W. Blankenship, was diagnosed with a brain tumor shortly after the trial of this case. Judge Blankenship, while ill and being treated for the cancer, understandably had periods of time when she could not keep up with her caseload. She continued working and fought valiantly against the malignancy before dying in 1999.

The record herein is replete with delayed rulings and judicial actions that a healthy Judge Blankenship would probably have handled with dispatch. This case is unique, in large part, due to the long hard battle that Judge Blankenship fought. Then, this court had to assume this case, which had progressed and grown in various directions during its pendency.

The initial motion for a new trial was granted by Judge Blankenship. TGI filed an appeal; however, the Supreme Court noted that the judgment was not final, due to unresolved claims, etc. The judgment was made final via a Rule 54(b) order and TGI proceeded with its successful appeal. After the Alabama Supreme Court issued its holding, judgment was entered by Judge Blankenship on January 11, 1995. After the said entry of judgment, numerous motions were filed that kept the litigation pending. In the words of the attorneys for TGI in their May 12, 1999 Motion for

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Complete and Final Relief for the Enforcement of Supreme Court Mandate:

> Since the entry of that [judgment reinstating the jury's verdict], however, numerous motions by Wilson and resulting stays of execution by the trial court have prevented TGI's collection of its judgment and frustrated implementation of the Supreme Court mandate. (p.l).

On June 1, 2000, the attorneys for TGI stated:

> There are two principle motions now **pending.** The first is Wilson's Motion filed January 7, 1997, which seeks to void entirely the $125,000 punitive damage judgment against him. *See* Appendix A. The other principle pending motion is that of TGI filed May 12, 1999, styled Motion for Complete and Final Relief for the Enforcement of Supreme Court Mandate. *See* Appendix B. (Brief in Support of Third Generation's Motion for Complete and Final Relief for the Enforcement of Supreme Court Mandate, p. 3).

After this Court entered its Order dated November 8, 2000, TGI filed a Petition for Writ for Mandamus, a petition for extraordinary relief, as there was no final judgment. "A judgment is generally not final unless all claims or the rights or liabilities of all parties have been decided." *Ex parte Harris*, 506 So. 2d 1003, 1004 (Ala. Civ. App. 1987). "A final judgment is a 'terminative decision by a court of competent jurisdiction which demonstrates there has been a

complete adjudication of all matters in controversy between the litigants within the cognizance of that Court.'" *Young v. Sandlin*, 703 So. 2d 1005, 1008 (Ala. Civ. App. 1997). In *Crane v. American Cast Iron and Pipe*, 682 So. 2d 1389 (Ala. Civ. App. 1996) the trial court, much like the trial court in the instant case, entered a final judgment adjudicating all issues pertinent to Crane's case. However, after a post-judgment motion, which was denied except for one portion, the appellate court lacked jurisdiction for an appeal. "An order that 'adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims of the parties' and 'is subject to revision any time before entry of judgment adjudicating all the claims and rights and liabilities of all the parties'" *Lunceford v. Monumental Life Insurance Co.*, 641 So. 2d 244, 246 (Ala. 1994). "A final judgment must adjudicate all matters in controversy between the litigants." *Scunziano v. Scunziano*, 630 So. 2d 64 (Ala. Civ. App. 1993), *cert. Quashed* 630 So. 2d 66 (Ala. 1993); *Crane v. American Cast Iron and Pipe*, 682 So. 2d 1389 (Ala. Civ. App. 1996).

It is noted that the Wilson v. TGI case was tried before July 17, 1998. That was the date on which the Supreme Court of Alabama decided *Life Insurance Company of Georgia v. Smith, supra.*

The Supreme Court of Alabama in *Life Insurance Company of Georgia v. Smith, supra.* indicated how pending cases should be treated. In the interest of fairness, the Court did not reverse and render the judgment for plaintiff Green in that case. The Court did reverse the flawed judgment and **remanded** for a **new trial.** This is exactly the outcome

that was ordered herein. A new trial was ordered by Judge Blankenship upon Wilson's initial motion for a new trial.

The retrospective application of *Life Insurance Company of Georgia v. Smith*, 719 So. 2d 797, 805-806 (Ala. 1998), *BMW of North America v. Gore*, 517 U.S. 559; 116 S.Ct. 1589; 134 L.Ed. 2d 809 (1996), and other similar post-1995 cases may, at first glance, appear to be prohibited by the U.S. Constitution's prohibition of Bills of Attainder (Article 1, Section 9) or Ex Post Facto-type laws (Article I, Sections 9 and 10). However, on closer examination, neither Constitutional provision prevents applying these two cases and their progeny to *Wilson v. TGI*. Justice Stevens addressed this when he wrote:

> The strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protection against "judgments without notice" afforded by the Due Process Clause, *Shaffer v. Heitner*, 433 U.S. 186, 217, 53 L.Ed. 2d 683, 97 S.Ct. 2569 (1977) (Stevens, J., concurring in judgment), is implicated by civil penalties. *BMW of North America v. Gore*, 517 U.S. 559, 575 (1996).

The Supreme Court of Alabama also clearly indicated how they will decide pending cases tried before July 17, 1998.

> "Consistent with the treatment afforded the plaintiff Green today [in *Life Insurance Company of Georgia v. Smith*] this new rule should not be applied so as to require reversal and rendering of

> a judgment for the defendant in any case tried before today." *Life Insurance Company of Georgia v. Smith*, 719 So. 2d 797, 807 (Ala. 1998).

Reading the dissenting opinions of Justices Almon and Cook in *Life Insurance Company of Georgia v. Smith* removes any doubt about the intention of that case to apply retrospectively. Justice Almon disagreed with the *per curiam* opinion's retrospective application of the rule established conclusively in that case. He stated, "Furthermore, although I concur in the overruling of *First Bank of Boaz*, *Shoals Ford*, and *Garrett*, I would make the overruling of those cases prospective only." at 815. Justice Cook wrote the following in dissent in *Life Insurance Company of Georgia v. Smith*: "Despite the semantics, the refusal [to search the trial record for some indicium of nominal damage] constitutes a retroactive application of the new rule." at 824. Additionally, as mentioned earlier, applicable case law existed at the time of trial to justify this result. It is this precise case law (*O.K. Bonding* line of cases) that has emerged as the law in Alabama. Indeed, the obverse line of cases, for reasons provided by the Supreme Court of the United States, would have been otherwise subject to Constitutional scrutiny and eventual death. This retrospective application to a case still pending is consistent with the recent decision of the Supreme Court of Alabama in *Osborn, M.D. and Izenburg, M.D. v. Roach*, 1000854 S.Ct. 2001 Ala. LEXIS 336.

While this is not the pattern that is ideal for cases to progress, it is nevertheless the way that this case has grown and developed. Both parties have had to deal with this abnormality, and no doubt, each party thinks it has suffered

more than the other. This ORDER should put the case on track for a direct and just resolution.

EXCESSIVENESS OF THE JUDGMENT

Wilson raised the issue of excessiveness of the jury's verdict in his initial motion for a new trial and in his 2002 Motion for New Trial.

The Supreme Court of Alabama has addressed circumstances under which a jury's verdict loses its constitutional protection and may be set aside.

> Upon finding a verdict to be flawed, the trial court, pursuant to A.R.Civ.P. 59(f), and this Court pursuant to Code 1975, section 12-22-71, may interfere with it. . . . First, it may include or exclude a sum which is clearly recoverable or not as a matter of law, or which is totally unsupported by the evidence. . . . *Hammond v. City of Gadsden*, 493, So. 2d 931, 932-933 (Ala. 1988).

The following could be taken into consideration by the trial court in determining whether the jury award of punitive damages is excessive or inadequate:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages

should be relatively small. If grievous, the damages should be much greater.

(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

(4) The financial position of the defendant would be relevant.

(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award. *Aetna Life Insurance Co. v. Lavoie*, 505 So. 2d 1050, 1062 (Ala. 1987), Houston, J., concurring specially; *Green Oil Co. v. Hornsby*, 493 So. 2d 218, 221-222 (Ala. 1986).

Of the above, TGI could make an argument as to factor number 5 as a counterclaim plaintiff; however, Wilson and others initiated this action to recover monies that they alleged had mysteriously disappeared. Certainly, arguments of other factors may be made; however, the failure of the jury to return a verdict for compensatory and nominal damages, would make any such arguments fragile.

Three Justices in a concurring opinion in *BMW of North America, Inc. v. Gore*, noted the following regarding appellate review of punitive awards in Alabama at the time that the order for a new trial herein was reversed.

The Alabama courts, in this case [*Gore*], have applied the "factors" intended to constrain punitive damages awards in a way that belies that purpose. *Green Oil Co. v. Hornsby*, sets forth seven factors that appellate courts use to determine whether a jury award was "grossly excessive" and which, in principle, might make up for the lack of significant restraint in the statute. But, as the Alabama courts have authoritatively interpreted them, and as their application in this case illustrates, they impose little actual constraint. at 589. (Breyer joined by O'Connor and Souter concurring).

Appendix B

This court finds that the jury's verdict in *Wilson v. TGI* is Constitutionally flawed. Specifically, the verdict violates the Due Process clause of the Fourteenth Amendment to the U.S. Constitution. The verdict is inconsistent in that while there is a $125,000 award of punitive damages, there is no award whatsoever of nominal damages or compensatory damages. In order to be consistent, the ratio between compensatory and punitive damages would be reasonable, and the application of the seven factors of *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989) would evince that the jury award was not grossly excessive. The specifics of the verdict make it impossible to arrive at a ratio that can be of any use. That is, 125,000 to 0 yields the same quotient as 1 to 0, 10 to 0, 20 to 0, and one million to 0. One reason for an award of at least nominal damages, in addition to an award of punitive damages, becomes evident. In this context, a zero as the denominator in a fraction makes the quotient useless. Case law existed *(Mid-State Homes, Inc. v. Johnson*, 294 Ala. 59, 311 So. 2d 312 (1975); O.K. *Bonding Co. v. Milton*, 579 So. 2d 602 (Ala. 1991)) at the time of the first order for a new trial in the instant case that justified a new trial.

The problems with the verdict herein are myriad and include Constitutional violations. It is quite evident that a $125,000 verdict in favor of TGI for punitive damages is inconsistent with the verdict for $0 in compensatory and nominal damages. The same verdict is tantamount to a severe criminal penalty. According to *Gore* and its predecessors, and progeny, the jury verdict for punitive damages herein, is and was grossly excessive in relation to legitimate punitive damages objectives, and hence an arbitrary deprivation of life, liberty or property in violation of the Due Process Clause

of the Fourteenth Amendment. Furthermore, the application of *Life Insurance Co. of Georgia v. Smith*, mandated scrutiny of the verdict herein. For the foregoing reasons, this court has no alternative other than to order a new trial.

WHEREFORE, the motion filed by plaintiff, Stephen M. Wilson is hereby GRANTED and a new trial is ORDERED based on the reasons stated herein. The motion filed by defendant, Third Generation, Inc., is hereby OVERRULED.

DONE and ORDERED on this the 13th day of May, 2002.

s/ Laura W. Hamilton
LAURA W. HAMILTON
CIRCUIT JUDGE

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